IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 743 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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KODARJI MAGANJI PARMAR

Versus

STATE OF GUJARAT

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Appearance:

MR KINARIWALA FOR BM GUPTA for appellants

MR KT DAVE, APP, for Respondent No. 1

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CORAM : MISS JUSTICE R.M.DOSHIT
and
MR.JUSTICE A.L.DAVE

Date of decision: 02/12/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. The appellants herein faced prosecution in Sessions Case No.58 of 1991 before the learned Additional Sessions Judge, Sabarkantha, at Himatnagar. They were accused No.1 and accused No.5 along with five other accused persons. They all were charged to have committed offence punishable under Section 302 read with Section 34, Sections 147, 148, 149, 504, 506(2) and 34 of Indian Penal Code and Section 135 of Bombay Police Act. At the end of the trial, the learned Additional Sessions Judge convicted the present appellants for the offences punishable under Section 302 read with Section 114 of I.P.C. and sentenced them to undergo life imprisonment and to pay a fine of Rs.500/-. They were further directed to underto rigorous imprisonment for three months in event of default in payment of find. Rest of the accused persons were acquitted. This judgment and order in Sessions Case No.58 of 1991 by the learned Addiitonal Sessions Judge, Sabarkantha, at Himatnagar was passed on 7.8.1992. The two convicts have preferred this appeal to challenge the said judgment and order. No acquittal appeal has been preferred by the State.

2. The facts of the case, in brief, can be stated thus:-

2.1 A First Information Report came to be lodged on the 27th February, 1991 by one Arjunsing Bhursing Parmar of Rajpur, taluka Himatnagar with Himatnagar Rural Police Station. According to the informant, on the previous day, i.e. on the 26th February, 1991, people had gathered in the main Chowk of the village and all the accused persons were playing at the beat of the drum. Accused No.1 (appellant No.1 herein) had a sword in his hand and was playing at the beat of the drum. At that time, complainant along with Setansing Punjaji, Lalaji Sonaji and Prithvising Ramsing went there and halted to watch the play. At that time, accused No.1 asked them as to why they had stopped beating the drum of their street and had come at the place. He asked them to go away or else they would be beaten. The other persons also started provoking by saying that, if they do not go, kill them with sword. Accused No.2-Rameshji, therefore, took the sword from Kodarji and rushed at the complainant and his group. Accused No.1-Kodarji did not let go his sword and gave a sword blow on Setansing Punjaji on his neck on the right hand side. Setansing, therefore, started bleeding and fell down and died on the spot. The complainant, therefore, raised alarm, as a result of which, Kodarji, Rameshji, etc. ran away from the place. Hearing the noise, brother and father of Setansing and other residents gathered. Takhaji Bapuji went to

Keshalpura for telephoning the police and the police came to the place following that information. On basis of the F.I.R., offence was registered and investigation made; Panchnamas were drawn; postmortem was performed of the dead body; muddamal seized was sent to Forensic Science Laboratory for analysis and, ultimately, charge sheet was filed before the learned Chief Judicial Magistrate, Himatnagar. Since the case was triable exclusively by the Court of Sessions, case was committed to the Court of Sessions and was registered as Sessions Case No.58 of 1991. Charge against the accused was framed at Ex.5. The accused persons pleaded not guilty of the charge and trial was, therefore, proceeded with.

2.2 After considering the evidence led by the prosecution, the Trial Court came to a conclusion that the prosecution was successful in establishing the charges against accused No.1 and accused No.5. He, therefore, convicted them, as stated above. Aggrieved by the said judgment and order, the appellants have preferred this appeal raising many contentions.

3. Mr. Kinariwala, learned advocate appearing for Mr. B.M. Gupta for the appellants, submitted that the Trial Court has committed an error of relying upon a single circumstance for convicting the accused persons. He has taken us through the record and proceedings and the judgment. The circumstance which has weighed with the Trial Court is finding of blood stains on the shirt and pant of accused No.1. Another piece of evidence that is relied upon by the Trial Court is the discovery of weapon by these two accused persons. Mr. Kinariwala submitted that neither of these pieces of evidence could have been relied upon by the Trial Court to convict the appellants for offence of murder. Mr. Kinariwala submitted that finding of blood on clothes of accused No.1 has been explained by the defence in cross-examination of father of the deceased, Punjaji Amthaji (Ex.55), wherein he has stated that accused-Kodarji had carried the deceased to his home. The description is such which would indicate that body of accused No.1 must have come in contact with the body of the deceased and, naturally, blood stains could be found on the clothes of accused No.1. Mr. Kinariwala, therefore, submitted that this aspect is overlooked by the Trial Court. So far as discovery Panchnama is concerned, Mr. Kinariwala submitted that the Panchnama of discovery claimed to have been drawn under Section 27 of the Evidence Act is not properly drawn. It cannot be considered as a Panchnama under Section 27 of the Act because it is a joint discovery. Besides this, if the

Panchnama is read, it only indicates that the weapon was discovered. There is nothing to indicate in the Panchnama that the weapon was concealed by the accused persons and that this was the weapon which was used in commission of the offence. This circumstance, therefore, could not have been relied upon by the Trial Court for convicting the accused. Mr. Kinariwala, therefore, submitted that the appeal may be allowed and the conviction and sentence recorded by the Trial Court may be quashed and set aside.

4. Mr. Dave, learned Additional Public Prosecutor, has opposed this appeal. According to him, although all the eye-witnesses have turned hostile, they have made certain admissions in their cross-examination to the learned Prosecutor at the trial and those admissions may be used for accepting the prosecution case. According to Mr. Dave, the deposition/evidence of a hostile witness cannot be discarded in toto. It can be accepted to some extent, i.e. to the extent it supports the prosecution case. Mr. Dave submitted that the Court below has properly evaluated the evidence and has convicted the culprits. The appeal may, therefore, be dismissed.

5. We have carefully gone through the record and proceedings and the judgment of the Trial Court.

6. Here is a case where all the eye-witnesses to the incident have not supported the prosecution case. Even the complainant and the father of the deceased have also turned hostile to the prosecution. The outcome is that the prosecution has not been able to establish the guilt of the accused persons by cogent and independent evidence direct in nature. The witnesses have been cross-examined by the defence and certain material admissions have been brought on record to indicate that the prosecution story is not believable. All the witnesses have stated that the sword was not with accused No.1, but was with accused No.2 (accused No.2 has already been acquitted by the Trial Court). The evidence of Punjaji Amthaji (Ex.55), father of the deceased, reveal that the deceased was questioned by him when he was brought to him and the deceased said that sword blow was given to him by Ramesh Amraji. He also states that Kodarji had carried Setansing to the house and, at that time, he had placed his arm on the neck of the deceased and was holding his biceps with the other hand. The arrest Panchnama of accused indicates that there were blood marks on the sleeve of the shirt and on the pocket of the shirt. There were blood marks on the trouser as well. In our opinion, the defence could be said to have reasonably

explained the finding of blood on cloth of accused No.1 particularly when there is not an iota of evidence to involve him in the incident.

7. So far as discovery of the weapon is concerned, which has weighed with the Trial Court, it may be noted that the Panchnama does not fulfil the requirement of Section 27 of the Evidence Act. There is nothing to indicate that they were the accused persons, who had concealed the weapon or that the weapon was the weapon used in commission of the offence. The Panchnama also indicates that it was a joint discovery by accused No.1 and accused No.5, i.e. the present appellants. All these taken together would clearly mean that this Panchnama cannot form the basis for conviction.

8. In view of the above facts situation, in our opinion, the Trial Court erred in convicting the accused persons, namely, accused Nos.1 and 5. The appeal, therefore, deserves to be allowed and the same is allowed. The judgment and order dated the 7th August, 1992, passed by the learned Additional Sessions Judge, Sabarkantha, at Himatnagar, in Sessions Case No.58 of 1991 is quashed and set aside. Appellant No.1 be set at liberty forthwith, if not required in any other case. Bail bond of appellant No.2 will stand cancelled. Muddamal to be disposed of as directed by the Trail Court.

[ MISS R.M. DOSHIT, J. ]

[ A.L. DAVE, J. ]

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